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No. 393

In the

Supreme Court of the United States

OCTOBER TERM, 1965

THE SILL CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM FOR PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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A. General Comments.

Although the Government's Brief opposes the granting of Certiorari, no serious challenge is made to the importance in condemnation law of the capitalization of income approach to value and hence the need for an authorative decision by this Court on the divergent theories applied below.*

* The Government's contention that its method of capitalization was correct is not supported by reason. *E.g.*, the Government does not explain why the *overall* value of the same piece of property will vary under its method of capitalization. See *Pet. for Cert.* p. 19, and Appendix B thereto. Also, Petitioner did not waive in the course of trial its objection to the Pre-Trial Order as Federal Rule 16 *expressly* makes the Order controlling upon the parties unless modified by the Court. The Petitioner requested an instruction that principal payments could not be considered an expenses. The Government's capitalization method treats mortgage amortization as an expense in computing net income. The instruction was refused (R. 927).

The Government does indicate that Petitioner's Questions III and IV are not of sufficient importance to warrant consideration. This Reply Memorandum will be confined to the importance for this Court to consider such Questions, particularly in reference to the Fourth Question.

B. Importance of Third Question Presented.

The Third Question presented by itself probably would not be of sufficient consequence for consideration by this Court. In conjunction with the first two Questions Presented, however, it affords this Court the opportunity to broadly consider the capitalization processes, particularly in reference to the various steps in computing the net income to be capitalized.* For this reason the Third Question should be considered along with Question I and II.

C. Importance of Fourth Question Presented.

The Fourth Question by itself *does* involve vital matters of substantial public importance. This Question, while couched in terms of excess mortgage proceeds in accordance with the specific facts of this case, could be restated thusly:

> "IV. Whether a governmental agency such as the FHA may promulgate policies, which retroactively govern contractual relations, by interoffice memoranda *without publishing such purported policies in the Federal Register or Code of Federal Regulations.*"

* Because deductions from the income to be capitalized had been made for repair and maintenance expenses, the further deduction of the amount of the Reserve for Replacement fund ($167,000) which was not condemned constituted the acquisition of property without compensation.

Petitioner submits that such Question is of substantial importance for consideration by this Court as evidenced by:

(a) *The Panama Refining Company v. Ryan*, 293 U.S. 388, decision of this Court which prompted the passage of the Federal Register Act, 49 Stat. 500. See discussion in *Administrative Law, Cases and Materials*, Jaffe and Nathanson (1961) p. 61.

(b) The investigation and inquiry by the House Government Operations Committee which was officially informed that the FHA did not retroactively effect sanctions upon existing contracts (exactly *opposite* to what the FHA did in the case at bar), *and that the policies that were promulgated appeared in the Federal Register and Code of Federal Regulations* (in this case the purported FHA policies *were not published*). See Document 95899, 85th Cong., 1st Sess. quoted in relevant part *Pet. for Cert.* p. 25.

(c) The vast growth of programs over which FHA exercises control, *e.g.*, urban renewal, make it imperative for this Court to now rule whether the Federal Register Act and the Administrative Procedure Act may be short-circuited by unpublished governmental inter-office policy letters.

Petitioner submits that the admission in evidence of the purported governmental policy regarding windfall which had not been published in either the Federal Register or the Code of Federal Regulations is contrary to the view of this Court, the intent of Congress and applicable decisions of the lower federal courts. A decision on the basic question regarding the obligation of governmental agencies to publish their policies will have a direct application to a vast number of situations. For these reasons Petitioner respectfully sub-

mits that the Fourth Question warrants full consideration by this Court.

Respectfully submitted,

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